Medical Center of Beaver County, Inc. and District 1199P, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, Petitioner. Case 6-RC-8976

April 30, 1982

DECISION AND CERTIFICATION OF REPRESENTATIVE

By Chairman Van de Water and Members Jenkins and Hunter

Pursuant to authority granted it by the National Labor Relations Board under Section 3(b) of the National Labor Relations Act, as amended, a three-member panel has considered objections to an election held on May 15, 1981, and the Hearing Officer's report recommending disposition of same. The Board has reviewed the record in light of the exceptions and briefs, and hereby adopts the Hearing Officer's rulings, findings, and recommendations.

The Hearing Officer recommended that we overrule the Employer's Objection 2, which alleged that Petitioner openly maintained during the election a tally or list of eligible voters in order to pressure and influence employees in casting their ballots. The Hearing Officer found that, although

¹ The election was conducted pursuant to a Stipulation for Certification Upon Consent Election. The tally was: 143 for, and 133 against, Petitioner; there were 9 challenged ballots, an insufficient number to affect the results.

² At the hearing, Registered Nurse Angeline Davis testified that, during the campaign, several licensed practical nurses (LPNs) in the bargaining unit told her that they were confused as to whether, if the Union won, they would have to pay an initiation fee if they did not join the Union prior to the election. In his discussion of Objection 5, the Hearing Officer stated that "[T]his hearsay testimony has not been considered" The Employer excepts to the Hearing Officer's failure to consider this testimony, contending that it was admissible, *inter alia*, under Fed. R. Evid. 803(3) as a "statement of the declarant's then existing state of mind, emotion, sensation or physical condition."

Davis was unable to recall specific statements of any LPN as to the cause of the confusion and her testimony was not corroborated by any individual who allegedly spoke to her. We find, therefore, that regardless of whether this testimony is admissible, it is of low reliability and minimal probative value, and the Hearing Officer's failure to consider it does not affect our adoption of his conclusion.

³ In his discussion of Objection 1, the Hearing Officer stated that "[I]t appears that the Board agent conducting the election established a 'no electioneering' area to extend to the corridor immediately outside the voting rooms." Additionally, in his discussion of Objection 6, the Hearing Officer found that hospital representatives were invited to appear on the "AM Connection" radio show, along with union supporters Kay Tillow and Mara Delfiacco. We find no evidence in the record to support these findings. However, the record otherwise fully supports the Hearing Officer's conclusions with respect to these objections, and we adopt his recommendations accordingly.

The Employer has excepted to certain credibility findings made by the Hearing Officer. It is the established policy of the Board not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. The Coca-Cola Bottling Company of Memphis, 132 NLRB 481, 483 (1961); Stretch-Tex Co., 118 NLRB 1359, 1361 (1957). We find no sufficient basis for disturbing the credibility resolutions in this case. We have carefully examined the record and find no basis for reversing his findings.

union adherents did maintain such a list, only one voter, Earline Clark, was shown to have seen it, and therefore the Petitioner's conduct was de minimis.

Our dissenting colleague would sustain this objection and set aside the election. Although he concedes that there is no direct evidence that any voter other than Clark saw the list, he would infer from circumstances that knowledge of the list was more widespread. We find that such an inference is unwarranted.

Petitioner's staff representative, Jack Hustwit, gave union adherents Madeline Berninger and Shirley Olshesky a list of eligible voters on a clipboard, and asked them to place a checkmark beside the names of employees who entered the employees' entrance to vote during the morning session. He instructed them to keep this activity confidential, and not to mark the list in view of any employees. Berninger and Olshesky adhered to these instructions. Olshesky testified that they kept the clipboard hidden from sight when employees passed by, and Berninger averred that they would not check off an employee's name until the employee had entered the building.

The dissent relies on the testimony of two nonunit witnesses who testified to having seen the list in inferring that voters other than Clark must also have seen it. However, one of these witnesses, Administrative Director for Anesthesia Arlene Verdier, testified that Berninger hid the clipboard under her coat.⁵ Thus, it is clear that the list was not maintained "openly," as alleged by the Employer.

Based on the record as a whole, we find that the union supporters attempted to hide their unauthorized voting lists and that these efforts were largely successful. The evidence presented by the Employer is inadequate to support an inference that more than one employee saw the list. Considering that the voting unit numbered approximately 315 employees, we agree with the Hearing Officer that the Petitioner's conduct was de minimis and does not warrant setting aside the May 15, 1981, elec-

⁴ Hustwit intended to use this list in determining whom to remind to vote in the afternoon.

⁵ The Hearing Officer also found that union adherent Mara Delfiacco periodically marked a list at the doctors' entrance during the latter part of the afternoon polling period. However, the record contains no suggestion that this list was maintained openly or was noticed by any voter.

Our dissenting colleague refers to unspecified unresolved conflicts in testimony in confessing puzzlement as to the source of this statement. After reviewing the record and the Hearing Officer's report, we find that the Hearing Officer resolved all relevant conflicts in testimony, and correctly found that only one unit employee was shown to have seen union adherents keeping the voting list. Although several members of management also saw the list, our dissenting colleague's conclusion that additional unit employees saw it is purely speculative and unsupported by the record.

tion. Accordingly, as the Petitioner received a majority of the ballots cast in the election, we shall issue a Certification of Representative.

CERTIFICATION OF REPRESENTATIVE

It is hereby certified that a majority of the valid ballots have been cast for District 1199P, National Union of Hospital and Health Care Employees, RWDSU, AFL-CIO, and that, pursuant to Section 9(a) of the National Labor Relations Act, as amended, the foregoing labor organization is the exclusive representative of all the employees in the following appropriate unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, and other terms and conditions of employment:

All full-time and regular part-time licensed practical nurses and technicians, including Autopsy Technicians. Bio-med Equipment Technicians, Cytologists, LPN's, Medical Lab Technicians, Nuclear Medical Technologists, Operating Room Technicians, Physical Therapy Assistants, Physical Therapy Technicians, Radiology Technologists, Radiation Therapy Technologists, Respiratory Technicians, and Ultra-Sound Technologists; excluding all other employees, office clerical employees, EEG and EKG Technicians, confidential employees, pharmacy technicians, sterilization process technicians, service and maintenance employees, medical laboratory technologists, registered nurses and other professional employees, guards and supervisors as defined in the Act.

MEMBER HUNTER, dissenting:

Contrary to the Hearing Officer and my colleagues, I would sustain the Employer's Objection 2 which alleged that the Petitioner's agents and representatives had openly kept and used a tally or list of eligible employees voting. While the Hearing Officer found this to be the case, he also found the list-keeping *de minimis*. On the facts as found by the Hearing Officer, ⁸ I believe that conclusion is erroneous. Accordingly, I would set aside the election.

The Hearing Officer noted that there were two entrances to the voting room used by the employees voting on election day. One entrance was called the employees' entrance⁹ and the other was

the doctors' entrance. Voting was in split sessions—morning and afternoon. During the morning session, two pro-Petitioner employees (who were considered agents of the Petitioner in this proceeding) were stationed at the employees' entrance to give "moral support" to the employees. 10 Halfway through the 3-1/2-hour morning voting period, a Petitioner agent gave one of these individuals a clipboard with an eligibility list so she could check off the names of unit employees passing through the entrance. The agent intended to use the list to contact unit employees who had not voted in the morning session to encourage them to vote in the afternoon. The pro-Petitioner employee checked off 10-12 names and returned the list to the agent after the morning session. The Hearing Officer noted the testimony of two employer representatives and a unit employee which confirmed that the employees checked off various names during the morning session. The Hearing Officer also found that one union adherent had a clipboard at the doctors' entrance during the afternoon session and made markings on the clipboard as individuals passed through that entrance. 11

While setting out the evidence on the extent of list-keeping activities by Petitioner's adherents, the Hearing Officer found these activities de minimis based on one narrow ground; i.e., his conclusion that only one unit employee (exclusive of the prounion employees who had kept the lists) was shown to have known of the list's maintenance and use. In light of the Hearing Officer's findings, I think an inference is mandated that knowledge of such a list was much more widespread than the Hearing Officer found. The Hearing Officer in essence credited at least three witnesses who indicated that the two adherents at the employees' entrance during the morning period had openly displayed and used the voting list. There was testimony that various individuals walked past the Petitioner's adherents who were keeping lists and one adherent was heard to state, "Did you get that one. has she voted; is she one of ours," as employees entered the hospital. Then, in the afternoon session, another adherent was seen at the doctors' entrance making markings on a clipboard as individuals went through the entrance.

⁷ See Robert's Tours, Inc., 244 NLRB 818 (1979), in which the Board found the keeping of an unauthorized voting list to be de minimis where only 1 voter in a unit of 27 was shown to have known of its existence.

⁸ I prefer to rely on the Hearing Officer's recitation of the facts rather than that set out by my colleagues for reasons I note at fn. 14, below.

⁹ The employees' entrance was 200 feet from the voting room and is the entrance normally used by the employees when going to work.

¹⁰ The Hearing Officer found that, under the circumstances, the Petitioner must be held responsible for all conduct engaged in by both members and nonmembers of the Petitioner's organizing committee who were stationed by the Petitioner at the hospital entrances during the polling period.

¹¹ The Hearing Officer also found that during the afternoon session two agents of the Petitioner would drive up to the doctors' entrance, pick up an adherent stationed there, and drive around the parking area to receive reports on voter turnout. One of these agents herself had a list of eligible voters in her car.

In light of the above, and given the Hearing Officer's finding that only one unit employee was shown to have known of the list's use, it appears that the Hearing Officer concluded that only direct testimony of bargaining unit employees who had actually seen the list could be considered and relied upon. In doing so, he erred because the Board has clearly indicated that employee knowledge that their names were being recorded may be "affirmatively shown or . . . inferred from the circumstances." Here, as indicated above, there is compelling circumstantial evidence that many bargaining unit employees had to have been aware of the list-keeping and I would so find. 13 Given these cir-

12 A. D. Juilliard and Co., 110 NLRB 2197, 2199 (1954).

cumstances, and in light of the Board's long-established policy prohibiting anyone from keeping any list of persons who have voted, aside from the official eligibility list maintained and controlled by the Board agent conducting the election, I must dissent.¹⁴

case, one of Petitioner's agents had instructed one of the adherents at the employees' entrance to keep the list concealed, the evidence does not show this was done and, in fact, the evidence reveals just the opposite. In the other cited case, Robert's Tours, Inc., 244 NLRB 818 (1979), which is also relied on by my colleagues, it appears that the person keeping the list was at some distance from the line of march to the polling area. Here, as noted, the list-keeping was done at the only two entrances to the voting area.

voting area.

14 See, generally, Piggly-Wiggly #011 and #228, Eagle Food Centers, Inc., 168 NLRB 792 (1967).

My colleagues buttress their decision by relying on a finding that the Hearing Officer never made. Thus, they assert that the employees who maintained the list "attempted to hide their unauthorized voting lists and that these efforts were largely successful." I confess puzzlement over the source of such a finding since: (1) there is nothing in the Hearing Officer's report to support it with regard to the afternoon session; and (2) there are conflicts in testimony concerning the morning session that were left unresolved by the Hearing Officer.

¹³ Neither of the cases cited by the Hearing Officer in support of his conclusion applies here. As the Hearing Officer notes, the list-keeping in *Tom Brown Drilling Company, Inc.*, 172 NLRB 1267 (1968), was "less serious than in the case at bar." In *Tom Brown*, only the first few voters were checked off and this conduct ceased when the Board agent gave instructions to stop. There was also no evidence that any employee knew his name had been checked off as the list was kept hidden. While, in this